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IN THE

Supreme Court of the United States

October Term, 1954.

No. 606.

ISADORE LENZNER and FREDA LENZNER,
Petitioners,

v.

CITY OF TRENTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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To the Honorable the Chief Justice and the Associate Justices of the United States:

Your petitioners, Isadore Lenzner and Freda Lenzner, respectfully pray the issuance of a writ of certiorari to the Supreme Court of New Jersey to review the judgment and decision of that Court rendered on November 22, 1954, which judgment and decision affirmed the decision of the Superior Court of New Jersey, Appellate Division, of February 8, 1954. Said judgment of the said Appellate Division affirmed the summary judgment of the Superior Court of New Jersey, Law Division, rendered on October 23, 1953, in an eminent domain proceeding to condemn the property of petitioners for parking purposes in accordance with an ordinance of the City of Trenton.

Opinions Below.

The majority and dissenting opinions in the Supreme Court of New Jersey are reported at 16 N. J. Reports 465 and 479.

The opinion of the Superior Court of New Jersey, Appellate Division, is reported at 29 N. J. Superior Court 514 (App. Div. 1954).

Jurisdiction.

The judgment of the Supreme Court of New Jersey affirming the judgment of the Superior Court of New Jersey, Appellate Division, which latter judgment affirmed the summary judgment of the Law Division for respondent, was dated and entered on November 22, 1954.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 United States Code, Sec. 1257(3).

Questions Presented.

The questions presented by this petition are:

1. Whether the condemnation is necessary and will actually provide greater parking facilities for the public than those now supplied by your petitioners as private owners;

2. Whether the City of Trenton acted in good faith in condemning the property of petitioners for parking purposes or has exercised its power of eminent domain ostensibly for a public use, but in reality for a private use; and

3. Whether petitioners are entitled to a plenary trial on the controversial issues of public necessity for and the good faith of the City of Trenton in condemning their property.

Statement of the Case.

Petitioners own certain lots in the central business district of the City of Trenton and also have a leasehold interest in certain adjoining rear lots, upon which very large tract of land petitioner, Isadore Lenzner, has operated a profitable parking yard for the public for a period of 25 years. Petitioners' property has a large frontage on the south side of Academy Street midway between North Broad and North Montgomery Streets and extends in equal depth through to East Hanover Street. A plat of its location is attached to the Appendix of this petition.

The Board of Commissioners of the City of Trenton created a Parking Authority in 1948 with the powers and duties provided by L. 1948, c. 198 (N. J. S. A. 40:11A-1 et seq.), which Authority recommended your petitioners' property as the best mid-city site for the creation of a ramp-type garage and further recommended that it be acquired by the City under the authority of L. 1942, c. 138 (N. J. S. A. 40:60-25.1) because the costs thereof would exceed the financial capacities of the Authority. On May 29, 1952, the Board of Commissioners adopted an ordinance for the acquisition of your petitioners' property for the public parking of vehicles, which ordinance ordained in pertinent part (37a):

> "1. That pursuant to the provisions of chapter 138 of the Laws of 1942, R. S. 40:60-25.1, et seq., it is hereby determined that the City of Trenton shall acquire by purchase or condemnation the following described lands for the purpose of making the same available to the public for the public parking of vehicles.
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> "4. The City Counsel be and is hereby authorized and directed to negotiate with the owners for the purchase of said lands, and upon failure to arrive at a price satisfactory to the city to institute condemnation

proceedings for the purpose of acquiring said lands in the manner provided by law."

Petitioners attacked the validity and constitutionality of the ordinance by Complaint "In Lieu of Prerogative Writ of Certiorari" filed on June 23, 1952 in the Law Division of the Superior Court of New Jersey on the grounds, inter alia, (1) that it was the intention and purpose of the Ordinance and the Board of Commissioners to acquire the property and parking yard business of petitioners without making just compensation therefor and then to operate and use the same for its own uses, purposes and profits, (2) that the Ordinance set forth no public necessity or purpose for the acquisition, and (3) that such intention and purpose violated the personal, legal and constitutional rights of petitioners under the Laws and Constitutions of the State of New Jersey and of the United States of America (47a to 51a).

No affidavits, answer or other pleading was interposed by the City of Trenton, which moved for and obtained an order for a summary judgment. The court did not pass on the factual, legal or constitutional grounds which had been raised other than to presume an intention on the part of the City of Trenton to make compensation for the business as well as for the land, and upheld the right of the City to have and exercise the power of condemnation even after creating a Parking Authority. See *City of Trenton v. Lenzner,* 22 N. J. Super. 415, 423. (Law Div. 1952).

This attack *in limine* upon the Ordinance was required under the Administrative or Statutory Eminent Domain practice and procedure that prevailed prior to July 1, 1953. See *Mulligan v. Perth Amboy,* 52 N. J. L. 132, 134 (Sup. 1889) and *In re The Buckeye Pipe Line Co.,* 13 N. J. 385, 389 (1953).

No appeal was taken from this interlocutory, summary judgment. Nor was the validity of the ordinance relitigated in the subsequent civil action brought by the City. In that judicial proceeding, petitioners assailed the exer-

cise of the power, not its existence, upon the grounds that the City was not acting in good faith and for a public purpose in seeking to take petitioners' property. The initial administrative proceeding was, therefore, no bar to the court's jurisdiction and duty to inquire into and determine whether the City was lawfully exercising its power of eminent domain.

Thereafter, the City of Trenton did not negotiate for the acquisition by purchase of petitioners' property; but pursuant to the new judicial practice and procedure under the Eminent Domain Act (R. S. 20:1-2, P. L. 1953, c. 20, and R. R. 4:92, et seq., and 4:85, et seq., all effective July 1, 1953) it instituted on August 4, 1953, a civil action in the Superior Court to acquire the property of petitioners by condemnation. The 1953 Act provides:

> "* * * In any such action, the court shall have and shall exercise its full jurisdiction, including jurisdiction to determine the right to exercise the power of eminent domain; * * *" (R. S. 20:1-2, P. L. 1953, c. 20) (cf. Rules 4:85-1 to 7; 4:92-1 to 13).

The Complaint of the City of Trenton alleged that it had determined it was reasonably necessary to acquire by condemnation the property of petitioners and demanded judgment and the appointment of condemnation commissioners (2a to 3a). The Answer of petitioners denied the allegations of the Complaint and averred to the contrary that the City of Trenton sought to acquire the property and parking yard business of petitioners not for itself in a governmental capacity but for other and private interests, that this condemnation proceeding was not reasonably necessary, and that the City's determination to exercise the power of eminent domain was not in good faith (9a to 10a).

The Answer set forth six separate defenses, which raised the following factual and legal issues, namely: (1) whether any definite and immediate intention or purpose for the acquisition existed (D33a-26), (2) whether the in-

tention and purpose of the acquisition was simply to take the property off the market without intention for immediate use, (3) what disposition and method of use and operation the City intended to make of the property after the acquisition, (4) whether the use and operation of the property would be far in the future and that therefore no public use or necessity now was shown or existed, (5) whether ultimately the acquisition would be the taking of private property for private use and thereby divest the owners of their private property and vest it in another private party, (6) whether the proposed acquisition was for the benefit of a limited group of private interests, (7) whether the City sought to acquire the property in a proprietary or a governmental capacity, and (8) whether the action by the City under the circumstances was inequitable (10a to 17a).

In support of the averments of the Answer, petitioners submitted affidavits by Isadore Lenzner, one of petitioners, and the depositions by oral examination in pretrial discovery of the Mayor, the City Traffic Engineer and the Executive Secretary of and Counsel for the Parking Authority, which affidavits and depositions disclosed without contradiction (a) that the only decision the City of Trenton and its Board of Commissioners had presently made was to take the property of petitioners and that the manner of its use after acquisition might not be determined for upwards of 10 years and possibly by a subsequent Board, (b) that the City's immediate purpose and intention in acquiring petitioner's property was to take it off the market and thus prevent its sale and use in the future for a store or some other private business enterprise, and (c) that there had been some discussion about building a ramp garage on the site for public use but no one had the slightest notion as to what actually would be done with it (D190a-17, 191a-24, 192a-27 to 193a-4, 206a-13, 210a-15, 235a-35, 236a-17, 246a-28, 247a-4, 252a-28, 253a-6, 262a-35, 264a-17, 267a-5, 272a-37, 273a-17).

Petitioners claimed but were denied a trial on these issues. A pretrial conference was held; but there was no

settlement of such issues because of an inability to agree. A motion for summary judgment was made by the City of Trenton at the suggestion of the trial court, was returnable on the day set for trial and was granted by the Superior Court, Law Division, because allegedly the pleadings and proofs showed palpably that there was no genuine issue as to any material fact and that the City of Trenton had a right to such judgment as a matter of law (D91a-24 to 92a-13).

From that summary judgment an appeal was taken to the Appellate Division of the Superior Court. The Appellate Division raised but did not determine the question whether the appeal was premature. It held in affirmance of the trial court that the pleadings and proofs revealed no genuine issue as to any material fact and that there was no substantially prejudicial deprivation of rights of petitioners by reason of the trial court's failure to afford them a plenary trial. See *City of Trenton v. Lenzner,* 29 N. J. Superior Court 514 (App. Div. 1954).

On appeal to the Supreme Court of New Jersey petitioners specifically raised and argued the following questions, viz:

1. Did the trial court erroneously deny petitioners' constitutional right to a trial, with or without a jury, and enter a summary judgment in view of the numerous issues of fact and law, and of respondent's burden of proof?

2. Was the proposed acquisition by condemnation in a private, proprietary and commercial capacity violative of petitioners' constitutional right?

3. Was the proposed acquisition without jurisdiction and unconstitutional because there was no public use, purpose or necessity shown and was merely for a private use for the benefit of a limited group of private interests or private party, and for the purpose of taking petitioners' property and parking yard business off the market?

4. Were all jurisdictional requirements complied with and were there bona fide negotiations by the City for the payment of constitutional compensation for all the elements involved?

5. Was the proposed acquisition inequitable, arbitrary, confiscatory, an abuse of power, and an unwarranted and unconstitutional seizure of property?

6. Was the proposed acquisition violative of the constitutional rights of petitioners under the Constitutions of New Jersey and the United States, and contrary to the law of the land?

Because the City of Trenton in its brief, at the oral argument and again at the reargument, reiterated that it intended to build a multi-story ramp garage on petitioners' property, which assertion was questioned by petitioners, counsel for the City agreed at the reargument that the City would put its determination with respect thereto in binding legal form. The decision of the case was consequently delayed pending such action. In due course counsel for the City advised the Supreme Court by letter that the City was unwilling to commit itself to the position its counsel had taken in its brief and at the oral arguments. See dissenting opinion of Chief Justice Vanderbilt in 16 N. J. Reports at pages 479-80. Petitioners were not notified of this letter.

The majority opinion of the Supreme Court of New Jersey delivered by Justice Jacobs and the dissenting minority opinion by Chief Justice Vanderbilt were in agreement upon the general principles of law that the taking of private property to provide increased parking facilities for the public constituted a public use, and that the City of Trenton had the power under L. 1942, c. 138 to condemn petitioners' property for that public purpose; but disagreed upon the controversial issues of (1) whether the condemnation of petitioners' property would provide greater parking facilities for the public, (2) whether the present condemnation was in good faith, and (3) whether petitioners were en-

titled to a plenary trial upon the said issues of necessity and good faith.

Erroneously presuming that the City intended and planned to build a ramp-type garage upon petitioners' property after its acquisition, the majority opinion concluded that the condemnation would increase the City's public parking facilities and that the City's determination to acquire petitioners' property by condemnation was in no wise tainted by fraud or bad faith and did not constitute an abuse of its broad discretionary powers. In a palpable contradiction of its mistaken presumption, the majority opinion referred to the Mayor's testimony that "the only decision actually made by the City was to acquire the property in accordance with the ordinance"; and then indulged in the further presumption that after the acquisition "the Board of Commissioners, in the faithful discharge of its official duties and the proper exercise of its discretion, will be obliged to determine what precise manner of operation will best serve to increase the parking facilities".

In contrast thereto, the dissenting minority opinion of Chief Justice Vanderbilt called specific attention to the City's refusal at the bar of the Supreme Court of New Jersey to commit itself to the position its counsel had taken and reiterated in his brief and at the oral arguments, namely, that the City "intended to build a multi-story ramp garage on the premises in question"; and stated that the only inference which could be drawn from that refusal was "i. e., that the use to which the City would put the property after condemnation would result in no greater parking facilities for the public than it is now obtaining through private ownership". The Mayor's oft-repeated testimony that no determination had as yet been made and might not be made for upwards of 10 years respecting the use to be made of petitioners' property after condemnation has been heretofore noted (p. 6 ante).

Anent the question of good faith, and, more particularly the disputed issues of public necessity for the taking

and whether the intended use after acquisition would be private or public, the majority opinion held that (1) "there was no basis whatever for inferring that the City's determination that it was necessary to acquire the Lenzner property (though other properties were available) was in anywise tainted by fraud or bad faith or constituted an abuse of its broad discretionary powers"; and (2) the fact that the City had the discretionary power to choose after condemnation between public and private construction and operation of petitioners' property and had considered it unwise to commit itself thereon in no wise suggested fraud, bad faith or abuse.

Contrariwise, the minority opinion stated that the conduct of the City before the Supreme Court, as previously outlined, strongly indicated it was not acting in good faith; that a factor deepening such impression was the City's failure to use a property it owned, which property was directly opposite petitioners' and equally sizable, was obviously quite as desirable, and had been practically abandoned for years, particularly since its use would double the City's parking facilities in that part of Trenton without the necessity of constructing any new buildings; and that there was no substance to the argument by the City that if it did not acquire petitioners' property now there was "always the danger that the owners will sell it for a department store, or other multi-story building and so decrease the amount of parking facilities available to the public".

Chief Justice Vanderbilt declared that because the City could without competitive bidding lease petitioners' property acquired by condemnation to a private individual or corporation for a parking lot at a profit, the possible and apparent danger to the public welfare and morals inherent in such an arrangement required the clearest proof of the City's good faith before it should be permitted to exercise the power of condemnation. The imminence of such a hazard was accentuated by the uncontradicted testimony that negotiations for the private operation of petitioners' prop-

erty were being actively carried on as late as August 19, 1953 (D208a-32 to 210a-40).

With respect to a plenary trial of the issues of good faith and necessity for the condemnation, the majority opinion concluded that there was no genuine issue as to any material fact and that the trial court was right in disposing of the present case by summary judgment; whereas the minority opinion maintained that a plenary trial was imperative upon the questions of good faith and necessity and whether petitioners' property was being taken "ostensibly for a public use but in reality for a private use", which questions could not be disposed of on a motion for summary judgment.

Chief Justice Vanderbilt aptly pointed out that the granting of such a trial would preclude the possibility of a wrongful exercise of the power of eminent domain, under which petitioners would be forced to submit "to having a valuable business taken away from them in the guise of serving the public interest without there being any increase in the parking facilities in the city, only to find that their business may be turned over by the city to another individual or private corporation to conduct at a profit".

Reasons for Granting the Writ.

The writ of certiorari should be allowed in the present case, because

1. The proposed taking of petitioners' property by condemnation is not for a necessary public use but for a private purpose, and constitutes a misuse of the power of eminent domain in violation of petitioners' constitutional right of property.

2. The City of Trenton has not acted in good faith and its abuse of the power of eminent domain is a judicial question to be decided and rectified only after full inquiry.

3. The refusal of a plenary trial upon the issues of purpose, necessity and good faith constitutes a denial of a fundamental right, is a material departure from the procedural requirement of due process, and is violative of the Fourteenth Amendment to the Constitution of the United States.

In considering these reasons, it should first be noted that the present condemnation proceedings were brought pursuant to the new practice and procedure under the New Jersey Eminent Domain Act (R. S. 20:1-2, P. L. 1953, c. 20 and R. R. 4:92, et seq., and 4:85, et seq., all effective July 1, 1953), which procedure is judicial and not administrative or statutory. The judicial method provides for the institution of a civil action in the Superior Court, Law Division, of New Jersey and further provides that the court in such action shall have and exercise "its full jurisdiction, including jurisdiction to determine the right to exercise the power of eminent domain".

The pleadings in the present case consisted of a complaint, an answer, a reply and an answer to new matter in the reply. Respondent, City of Trenton, had the burden of proving that it possessed the power of eminent domain, the public use and necessity therefor, its inability to agree with the owners, its intention to complete the project and due compliance with all preliminary steps. Concededly the trial judge did not hear any oral testimony and afford the defendants (i. e., petitioners) a trial.

1. *The proposed taking of petitioners' property by condemnation is not for a necessary public use but for a private purpose, and constitutes a misuse of the power of eminent domain in violation of petitioners' constitutional right of property.*

That the public would not be provided with greater parking facilities than the private owners (i. e., petitioners) were supplying and that there was no present necessity for

condemning petitioners' property and parking yard business was convincingly established by the actions and conduct of the City of Trenton. First, it refuted the statement of counsel in its brief, at the oral argument and again at the reargument before the Supreme Court of New Jersey that the City intended to build a multi-story ramp garage on petitioners' property after condemnation; and refused to commit itself or put its determination in that respect in binding legal form. Second, the Mayor repeatedly testified that the City had made no decision or determination as yet beyond that of taking petitioners' property, that the decision and determination as to what use would be made and in what manner of petitioners' property after the taking might not be made for upwards of 10 years and by a subsequent Board of Commissioners, and that the immediate intention and purpose of acquiring petitioners' property and parking yard business was to take it off the market and thus prevent it being sold for other private enterprise uses such as the construction of a store (D190a-17, 191a-24, 192a-40 to 193a-4, 204a-9, 25, 32, 206a-13, 210a-15, 235a-35, 236a-17).

Third, the City Traffic Engineer testified that the City wanted to get the land first and then decide what to do with it; and that the immediate intention and purpose of getting the land was to prevent its sale for other private uses such as a store (D246a-28, 247a-4, 252a-28, 253a-6). Fourth, counsel and Executive Secretary of the Trenton Parking Authority stated in his testimony that the Authority went to the City with a strong recommendation that the property be acquired in the first place so that it would be preserved for parking and not become a Macy Department Store or something of that sort; and that he did not have the slightest notion what the City Commissioners were going to do with the property and how it would be operated, and was uncertain "unless private enterprise winds up with it" (D262a-35, 264a-17, 267a-5, 273a-11, 17). Finally, the Coverdale & Colpitts survey and report recommended

that petitioners' parking yard should be taken off the market (D263a-15, 272a-37). The denial of a plenary trial prevented the production of that report under a subpoena duces tecum at the deposition hearing in pretrial discovery, which subpoena the officials of the City of Trenton had refused to honor (D182a-12 to 183a-27).

The uncontradicted evidence that there was no present urgent need to increase existing parking facilities is corroborated by the failure of the City to make use of the practically abandoned property directly opposite that of petitioners and thus double the parking facilities of that section of Trenton without constructing any new buildings. The existence of this available parking site helps to explain the purpose underlying the City's determination to take petitioners' property off the market, viz., to prevent a business change of use rather than to increase parking facilities.

That petitioners' property was to be taken for a private, not public purpose, and further that there was a reasonable basis for the fear expressed in the minority opinion that ultimately petitioners' property and parking yard business might be turned over by the City to another individual or private corporation to conduct at a profit, is shown by the testimony in pretrial discovery of the Mayor, the City Traffic Engineer and the Executive Secretary of the Authority. The averments in petitioners' answer and in the affidavits of Isadore Lenzner, which averments disclose that the City of Trenton is seeking to take petitioners' property for private use and the benefit of a limited group of interests, are also corroborative of the private purpose that underlies the condemnation.

Another circumstance directly bearing upon the inequity of the proposed condemnation of petitioners' property is the fact that while the City has other lands available for parking purposes in the immediate neighborhood, yet there is no other place in that vicinity to which petitioners can move or conduct their parking yard business. The effect of the proposed condemnation will be an irreparable

and total destruction of petitioners' parking yard business and the receipt by the City of Trenton for its own uses, purposes and profits of all the rents, profits and income to be derived from the operation of petitioners' property as a parking lot. In view of the constitutional jurisdiction of courts of law in New Jersey to grant complete equitable relief, such an unjust result should never be tolerated in the absence of a true emergency for the seizure and confiscation. See *Scatuorchio v. Jersey City Incinerator Authority*, 14 N. J. Reports 72 (1953) and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

Throughout the present civil action of eminent domain the City of Trenton has insisted that it was taking only the lands of petitioners and not their parking yard business. The complaint expressly provides compensation for the lands by metes and bounds, but has no provision whatever for the fixing of compensation for the taking of the parking yard business (D29a-23). In reiteration thereof, the reply of the City alleges that "it is immaterial whether or not there is another location in the vicinity of the defendants' present place of business, or any other location to which said defendant can move or conduct its business" (D32a-39). But this inequitable contention disregards Article I, Section 1 of the 1947 New Jersey Constitution, under which there is a natural and unalienable right to acquire, possess and protect property. Since a parking yard business is property (Cf. *Barr v. Essex Trades Council*, 53 N. J. E. 101 (Chancery 1894); *State v. Chapman*, 69 N. J. L. 464, Aff. 70 N. J. L. 339 (E. & A. 1904); *Columbia Delaware Bridge Co. v. Geisse et al.*, 34 N. J. L. 268, Aff. 35 N. J. L. 558 (E. & A. 1871); *Columbia Delaware Bridge Co. v. Geisse et al.*, 35 N. J. L. 474, Aff. 36 N. J. L. 537 (E. & A. 1873); *Columbia Delaware Bridge Co. v. Geisse*, 38 N. J. L. 39, Aff. 38 N. J. L. 580 (E. & A. 1876); and *In Matter of Highway*, 22 N. J. L. 293 (Sup. Ct. 1849)), petitioners cannot be deprived of that business without just and equitable compensation under the Fourteenth Amendment.

Although the issue of just compensation had not yet been decided, the majority opinion warns that due regard must be given to the value of petitioners' parking yard business in determining just compensation for the taking by emphasizing (a) that under the law of New Jersey the measure of just compensation is "fair market value"; and (b) that, although the property owner may not be entitled to independent compensation for the value of the business necessarily destroyed by the taking, yet a foremost factor in determining what is just and equitable compensation is "prospective earning power evidenced in considerable part by past earnings". It remains to be seen whether or not the consequential loss of petitioners' parking yard business will be given fair and equitable consideration as an element of the just compensation rightly due to petitioners as owners of that business.

It is hornbook law requiring no citation of authority that public use as well as the necessity of the acquisition are essential prerequisites to a valid exercise of the power of eminent domain. The minority opinion declares that "the Constitution forbids the condemnation of property for private use", that "when land is thus taken, ostensibly for a public use, but in reality for a private use, the invasion of the individual's constitutional right of property is remedial by judicial action" and that the power of condemnation in municipalities for off-street parking facilities may be exercised only "if by doing so the public will be provided with greater parking facilities". The minority opinion observed that "the courts have never permitted statutes to be used in such a way as to pervert their true objective by a mere colorful compliance with their requirements" and that "an abuse of the statutory discretion and power is as objectionable here as in other fields of governmental action."

It is respectfully submitted that the pleadings and proof in the present case clearly establish the misuse by the City of Trenton of its power to condemn private property

by taking petitioners' property for an unnecessary private use that will not increase public parking facilities.

2. *The City of Trenton has not acted in good faith and its abuse of the power of eminent domain is a judicial question to be decided and rectified only after full inquiry.*

Of the many factors disclosing the lack of good faith on the part of the City of Trenton in condemning petitioners' property, perhaps the most cogent circumstance is the action of the City before the Supreme Court of New Jersey. In order to show that the public would be provided with greater parking facilities by the condemnation, counsel for the City in its brief, at the oral argument, and again at the reargument, reiterated that the City "intended to build a multi-story ramp garage on the premises in question". In passing it should be noted that this statement was completely at variance with the testimony of the Mayor, the City Traffic Engineer and the Executive Secretary of the Trenton Parking Authority. Under these circumstances it is not surprising that the City in refutation of its counsel was forced to advise the Court of its unwillingness to commit itself to such a present intention and plan.

Another illustration of the City's lack of good faith in condemning petitioners' property is the reluctant admission that the City has no present intention or plan with respect to that property other than to take it off the market and thus prevent its use for some other business purpose. It flatly refused to bind itself to build a multi-story ramp garage or to increase the parking facilities of petitioners' property in any other manner.

A third factor showing that the City was not acting in good faith in condemning petitioners' property is its unexplained and unexplainable failure to make an abandoned school site into a public parking lot even though such conversion would double the parking facilities of the particular

section of Trenton without constructing a garage or any new buildings thereon.

A fourth and final factor evidencing the lack of good faith on the part of the City is its conduct in negotiating for the possible operation of petitioners' property by a private individual or corporation as a parking lot at a profit. These negotiations were being actively conducted up to the institution of the condemnation proceedings because in view of financial problems the City and the Authority might be better off to have petitioners' property operated by private enterprise (D262a-13 to 21, 265a-22 to 36, 266a-32 to 267a-12).

It is respectfully submitted that the actions and conduct of the City of Trenton with respect to the condemnation of petitioners' property have at every stage demonstrated the absence of good faith on the part of the City. This lack of good faith is likewise a judicial question which should not be summarily disposed of without a full hearing on the merits.

3. *The refusal of a plenary trial upon the issues of purpose, necessity and good faith constitutes a denial of a fundamental right, is a material departure from the procedural requirement of due process, and is violative of the Fourteenth Amendment to the Constitution of the United States.*

The avowed statutory purpose of the 1953 Eminent Domain Act in changing the practice and procedure from administrative to the judicial method was to confer upon the Superior Court the full power, right and duty to determine whether the power of eminent domain was being rightly exercised. In order to assure a full judicial inquiry into this basic question, the Act provided for the institution of a civil action in the Superior Court with the filing of pleadings (complaint, answer, etc.) and a trial on the return day.

An eminent domain proceeding now follows the same procedure as a civil action in the Law Division of the Superior Court. This necessarily involves the usual pre-trial procedure, including the right of discovery, the taking of depositions, the submission of interrogatories and other preliminary proceedings provided by the rules of court, a formal pre-trial conference with its usual features, and an actual trial of the issues of fact and law involved.

The defendant in a civil action of eminent domain is entitled to his day in court by a formal trial because the numerous issues of fact and law incident to condemnation cannot be adequately presented on a motion for summary judgment with only ex parte proofs and the pleadings before the court. The minority opinion of the Supreme Court asserts that where as here the conduct and acts of the condemnor clearly show a lack of necessity for the condemnation, as well as a lack of good faith, it becomes imperative that there shall be a full judicial inquiry in order to make sure that the power of eminent domain is being truly exercised for a rightful public purpose.

It is well settled under the decision law of New Jersey that a summary judgment should not be granted if there is any genuine issue of fact presented by the record and that when the facts are in dispute, the trial court has no alternative but to deny a motion for summary judgment and submit the issues to formal trial. See *Tsibikas v. Morrof*, 5 N. J. Super. Ct. 306 (App. Div. 1949) at page 310; *Cabinet v. Shapiro*, 17 N. J. Super. Ct. 540 (Law Div. 1952); *Miller v. Atlantic Cas. Ins. Co.*, 16 N. J. Super. Ct. 531 (Law Div. 1951); and *Martin v. Mazziotti*, 11 N. J. Reports 287 (1953).

Rule 3:56-3 of New Jersey, which was taken from Federal Rule 56(c) and provides that summary judgment shall be granted only if the pleadings, depositions, admissions and affidavits show palpably that there is no genuine issue as to any material fact, was construed in the case of *Mayflower Industries v. Thor Corp.*, 15 N. J. Super. Ct. 139 (1951) to mean (pp. 155-56):

"The quoted language of this rule was taken from Federal Rule 56(c). Under the construction of the federal courts, this language was not designed 'to cut litigants off from their right of trial by jury if they really have issues to try', and summary judgment should be granted only where 'no genuine issues remain for trial'. Chappell v. Goltsman, 186 F. 2d 215 (C. C. A. 5th Cir. 1950). The matter cannot be decided on the affidavits of the parties where the facts are in dispute or where conflicting factual inferences may be drawn from them. Arnstein v. Porter, 154 F. 2d 464 (C. C. A. 2d Cir. 1946); Chappell v. Goltsman, supra. 'Affidavits . . . are of value only when they indicate the non-existence of factual issues and they have no value when they attempt to resolve a factual issue in favor of one of the parties'. Kaiser Co. v. Ric-Wil Co., 95 Fed. Supp. 54, 55 (D. C. N. D. Ohio 1950).

"The appellate courts in the federal domain have constantly admonished the trial courts against weighing affidavits and deciding the credibility of witnesses in a proceeding seeking summary judgment.

"For example, in Chappell v. Goltsman, supra, the court said:

> " 'It seems clear to us that the basis of the court's opinion was not that there were no genuine fact issues, but rather that there were such issues which it proceeded to decide adversely to appellants, although the motion raises questions of intent, unfair competition and perfidious dealings which ought not to have been disposed of by summary judgment and without trial on the merits.'

"And in Arnstein v. Porter, supra, the Court of Appeals for the Second Circuit said:

> " 'We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing sum-

> mary judgments, intended to permit a "trial by affidavits" if either party objects. That procedure, which, so the historians tell us, began to be outmoded at common law in the 16th century, would, if now revived, often favor unduly the party with the more ingenious and better paid lawyer. Grave injustice might easily result.' "

This Court has recently construed Federal Rule 56 in a similar manner. In the case of *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620 (1944), Justice Jackson stated (p. 627):

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try. American Insurance Co. v. Gentile Brothers Co., 109 F. 2d 732; Whitaker v. Coleman, 115 F. 2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end."

The record in the present case discloses that the gravamen of petitioners' complaint is not predicated solely upon the mistake of fact and law by the trial court in granting the City's motion for summary judgment but is primarily based upon the denial by the trial court of petitioners' fundamental right to a trial upon whether the City of Trenton was exercising the power of eminent domain in good faith and for a necessary public purpose. That the fundamental issues of good faith and necessity were specifically raised by the pleadings and proofs submitted by petitioners, and that a genuine dispute existed upon these two material

questions of fact, has been fully demonstrated in earlier portions of this petition (pp. 4-8 ante).

The trial court was under the 1953 Eminent Domain Act obligated to determine after full inquiry the judicial question of whether the City of Trenton, although colorably complying with the statutory requirements of fulfilling a necessary public purpose and use and of acting in good faith in that respect, was in reality condemning petitioners' property unnecessarily and for a profitable private use. When, therefore, such a full inquiry was denied by the granting of a summary judgment, this constituted a denial of due process in violation of the Fourteenth Amendment.

The non-adherence to the procedural requirement of due process in a State condemnation proceeding involving the taking of private property for an alleged public use will justify the allowance by this Court of a writ of certiorari to review that proceeding. Although the term "due process of law" does not admit of specific definition applicable to all cases and must be determined in the light of the facts and circumstances of each case, yet this Court has repeatedly stated that the failure to pay just compensation, a prerequisite to the taking of private property for public use, constitutes a denial of due process. It is respectfully submitted that the prerequisites of good faith and the existence of a necessary public purpose or use are of equal importance; and where these prerequisites are not proved by the condemnor and are refuted by competent proofs to the contrary adduced by the private owner, the granting of condemnation without a full hearing thereon is a denial of due process because it deprives the private owner of a fundamental right. This is particularly true where, as here, the condemnation proceeding is a civil action, the trial court has express statutory authority to examine into and determine the right of the condemnor to exercise the power of eminent domain, and the burden of proving that the condemnation is for a bona fide and necessary public use has not been met by a condemnor charged

with seeking in bad faith the condemnation of private property for a private purpose.

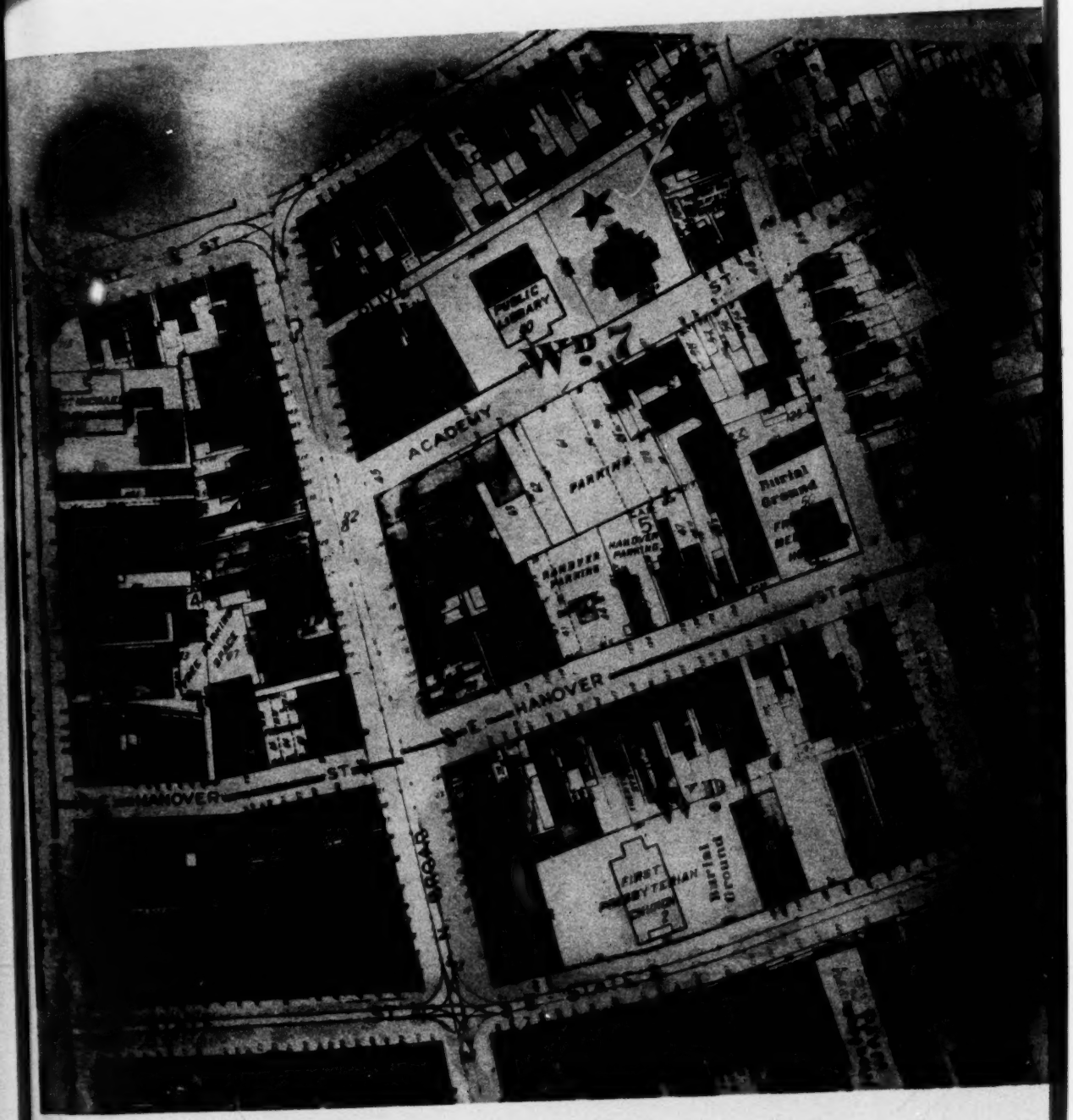
The majority opinion concedes that the exercise of the discretionary power of eminent domain may be upset by the courts upon an affirmative showing of fraud, bad faith or manifest abuse and devotes considerable space to countering the charge and justifying its conclusion that the acts and conduct of the City of Trenton do not show fraud, bad faith or abuse in the determination to take petitioner's property. The fundamental error of the majority opinion lies in ignoring the affirmative proofs of petitioners and denying a full plenary hearing upon these controversial issues. The majority opinion justifies its denial of the fundamental right of trial upon the erroneous presumption that the City of Trenton intended and planned to build a multi-story ramp garage upon the condemned site in order to increase public parking facilities and also upon the conjectural surmise that once petitioners' property has been acquired the City of Trenton and its Board of Commissioners will somehow and at some future time determine in good faith the manner in which petitioners' property may and can be used to increase the public parking facilities of the City of Trenton.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Robert T. McCracken,
George G. Chandler,
Attorneys for Petitioners.

PLAT OF SITE.



★ School property practically abandoned for years.

CITY OF TRENTON v. LENZNER,

16 N. J. Reports 465 (1954).

MAJORITY OPINION.

The opinion of the court was delivered by

JACOBS, J. The Appellate Division affirmed the summary judgment for the plaintiff which had been entered in the Law Division. See *City of Trenton v. Lenzner,* 29 *N. J. Super.* 514 (*App. Div.* 1954). We granted certification under *R. R.* 1:10-2.

Trenton's parking problem is a serious one and has been the subject of much concern amongst its officials and citizens. In 1948 its board of commissioners adopted an ordinance which, after setting forth that congested street parking was threatening irreparable loss in valuations and was inimical to the general welfare of the community and that it could be reduced by proper off-street parking facilities, created the Parking Authority of the City of Trenton with the powers and duties provided by *L.* 1948, *c.* 198 (*N. J. S. A.* 40:11*A*-1 *et seq.*). Immediately after its creation, the Authority began inquiry into the feasibility of establishing new parking facilities within the city. In 1950 it sought to determine the best mid-city site for the creation of a ramp-type garage—the site recommended was Lenzners' property located on East Hanover and Academy Streets and operated by them as a parking lot. Apparently the same site had been recommended earlier by the planning board. An engineering firm specializing in ramp construction submitted drawings and approximations of costs. The Authority, considering that the costs would exceed its own financial capacities, recommended that the site be acquired by the city under the authority of *L.* 1942, *c.* 138 (*N. J. S. A.* 40:60-25.1). *Cf. L.* 1949, *c.* 261 (*N. J. S. A.* 40:56-1.1).

On May 29, 1952 the board of commissioners adopted an ordinance which determined that the city acquire Lenzners' property, described by metes and bounds, by purchase or condemnation "for the purpose of making the same available to the public for the public parking of vehicles." Thereafter the Lenzners instituted a proceeding in the Law Division which attacked the validity of the ordinance and sought to set it aside. In that action the city moved for summary judgment and its motion was granted. See *Lenzner v. Trenton*, 22 *N. J. Super.* 415 (*Law Div.* 1952). No appeal was taken from the resulting judgment for the city and the Lenzners are bound by it. They are not at liberty to relitigate the issues there involved (*Bango v. Ward*, 12 *N. J.* 415, 420 (1953); *Templeton v. Scudder*, 16 *N. J. Super.* 576 (*App. Div.* 1951)); in any event, we are satisfied with the correctness of the determinations there made.

L. 1942, *c.* 138 expressly provides that the governing body of any municipality may, by purchase or condemnation, acquire lands for the purpose of making them available to the public for the public parking of vehicles. There is no question as to the constitutional validity of this legislation; the state has ample power to delegate to its municipal subdivisions power to take private property for public use upon the payment of just compensation. See *Abbott v. Beth Israel Cemetery Ass'n. of Woodbridge*, 13 *N. J.* 528, 545 (1953); *Borough of Little Ferry v. Bergen County Sewer Authority*, 9 *N. J.* 536, 543 (1952); *Ryan v. Housing Authority of Newark*, 125 *N. J. L.* 336, 341 (*Sup. Ct.* 1940); *Valentine v. Lamont*, 25 *N. J. Super.* 342, 347 (*App. Div.* 1953), affirmed 13 *N. J.* 569 (1953). The public use may be proprietary as well as strictly governmental in nature. *Cf. Yara Engineering Corp. v. Newark*, 132 *N. J. L.* 370, 373 (*Sup. Ct.* 1945); *Brady v. Atlantic City*, 53 *N. J. Eq.* 440, 448 (*Ch.* 1895); *Jahr, Eminent Domain* (1953), 14, 16. What constitutes a proper use will depend largely on the social needs of the times and may change from generation to generation. See *Ryan v. Housing Authority of Newark, supra;*

Texas Pipe Line Co. v. Snelbaker, 30 *N. J. Super.* 171, 176 (*Law Div.* 1954); *Jahr, supra. Cf. Albright v. Sussex County L. & P. Com.*, 71 *N. J. L.* 303, 304 (*E. & A.* 1904), where Justice Dixon found occasion to remark, shortly after the turn of the century, that the scope of eminent domain had "been much enlarged in recent times to keep pace with the advance in social conditions." In the light of modern conditions, it may no longer be doubted that the maintenance of public parking facilities designed to relieve traffic congestion constitutes a proper public use. See *DeLorenzo v. City of Hackensack*, 9 *N. J.* 379 (1952); *McSorley v. Fitzgerald*, 359 *Pa.* 264, 59 *A. 2d* 142 (1948); *Jahr, supra.*

While the fact that the property is actually being used for parking purposes by its private owners may have an important bearing on the amount of just compensation to be awarded, it does not limit the authority of the governing body to take it for public parking purposes. Nothing in the broad statutory language suggests any such limitation and there is no reason whatever to reach out for its implication. See *Const.* 1947, *Art.* IV, *Sec.* VII, *par.* 11; *Monmouth Lumber Co. v. Ocean Township*, 9 *N. J.* 64, 71 (1952). By taking the land the city insures not only that its future use will be public parking, but also that it will be available for the urgently needed increase of its parking facilities by the construction of a suitable ramp garage or otherwise. The fact that the land is being taken by the city itself rather than the Parking Authority is without significance. When the statute authorizing the creation of the Parking Authority was adopted it did not repeal the pre-existing power of the city under *L.* 1942, *c.* 138, to acquire land for public parking. See *DeLorenzo v. City of Hackensack, supra.* Similarly, when the city created the Parking Authority it did not restrict its own independent power to acquire land for public parking under the terms of *L.* 1942, *c.* 138; and when it acquires such land it may itself operate the resulting parking facility or transfer it to the Authority for its public operation in accordance with the terms of the Parking Au-

thority Law (*L.* 1948, *c.* 198), or otherwise provide in accordance with law (*L.* 1954, *c.* 205, *N. J. S. A.* 40:60-25.1) for its operation as a public parking facility. See *DeLorenzo v. City of Hackensack, supra. Cf. Camden Plaza Parking v. City of Camden,* 16 *N. J.* 150 (1954).

Negotiations for purchase having been unfruitful, the plaintiff City of Trenton filed a complaint in the Law Division, on August 4, 1953, alleging that it had determined that it was reasonably necessary to acquire by condemnation the described property of defendants Isadore Lenzner and Freda Lenzner and demanding judgment and the appointment of condemnation commissioners in accordance with *R. S.* 20:1-1 *et seq.* The defendants filed their answer which embodied various separate defenses and the plaintiff filed a reply. Thereafter the plaintiff moved for summary judgment which was heard and considered by the trial judge on the basis of the record before him which included all of the pleadings, affidavits, depositions and exhibits submitted by the parties. Finding that there was no genuine issue as to any material fact challenged and that plaintiff was entitled to judgment as a matter of law, the trial judge on October 26, 1953 ordered the entry of judgment for the plaintiff for the appointment of condemnation commissioners to fix "the compensation to be paid for the taking of the lands, premises, property, rights and easements described in the complaint, including the damages, if any, resulting from the taking to any remaining property." It is from this order that the defendants' appeal to the Appellate Division was taken. No question was raised before the Appellate Division or this court as to the immediate appealability of the order that condemnation commissioners be appointed. See *Bergen County Sewer Authority v. Bor. of Little Ferry,* 7 *N. J. Super.* 213, 218 (*App. Div.* 1950), appeal dismissed 5 *N. J.* 548 (1950). *Cf. In re Buckeye Pipe Line Co.,* 13 *N. J.* 385, 388 (1953).

The appellants urge that they were improperly denied the "right to a trial." They do not suggest that they were entitled to a jury trial on the application for appointment

of commissioners. See *L.* 1953, *c.* 20 (*N. J. S. A.* 20:1-2); *In re Housing Authority of Newark,* 126 *N. J. L.* 60, 64 (*E. & A.* 1941). They contend, however, that they were entitled to present oral testimony before the trial judge and have a plenary trial in the Superior Court. *L.* 1953, *c.* 20, provides that the Superior Court shall have full jurisdiction in any action for the appointment of condemnation commissioners and "may proceed in the action in a summary manner or otherwise." The pertinent court rules (*R. R.* 4:92-1; *R. R.* 4:85-5) provide that if there is no "genuine issue as to any material fact, the court may try the action on the pleadings and affidavits, and render final judgment thereon." See also *R. R.* 4:58-3; *Taub v. Taub,* 9 *N. J. Super.* 219, 221 (*App. Div.* 1950). The finding by the trial judge that the record before him disclosed that there was no genuine issue as to any material fact was unanimously concurred in by the Appellate Division; independent examination of the record has led us to the same conclusion. Under these circumstances there can be no doubt as to the adequacy of the trial court's power to deal with and finally dispose of the matter on the application for summary judgment. See *City of Newark v. N. J. Turnpike Authority,* 7 *N. J.* 377, 381 (1951).

The appellants contend that the city has other property available on Academy Street and elsewhere in Trenton for public parking and that there was no public necessity for taking their particular property. In *Burnett v. Abbott,* 14 *N. J.* 291, 294 (1954), Justice Oliphant aptly pointed out that in "condemnation proceedings the quantity of land to be taken, its location and the time of taking are within the discretion of the body endowed by the Legislature with the right of eminent domain." The exercise of such discretion will not be upset by the courts in the absence of an affirmative showing of fraud, bad faith or manifest abuse. See *Burnett v. Abbott, supra; City of Newark v. N. J. Turnpike Authority, supra; Faubel v. Buckeye Pipe Line Co.,* 20 *N. J. Super.* 116, 120 (*Law Div.* 1952). Mr. Connell, executive

secretary and counsel for the Trenton Parking Authority, testified at the appellants' taking of depositions, that after considerable investigation, which included reports from experts in the field, the appellants' property was determined to be the best mid-city site for the erection of a ramp type garage; that this coincided with the planning board's views; that an engineering firm specializing in ramp construction had submitted drawings and approximations of costs and that the Authority, considering that the costs would exceed its own financial capacities, had recommended that the property be acquired immediately by the city to insure that it would be used and expanded as a public parking facility. Mayor Connolly testified that the city had determined to acquire the property as a public parking area on the recommendations of the planning board, the Parking Authority and their experts, and that it planned to build a ramp-type garage. He acknowledged that the only formal action taken by the city was directed toward acquiring the property for public parking, but thought "it would be incumbent upon the city to make further use of the Lenzner property by the construction of a ramp type garage or certainly adding to the present facilities." Mr. Ortlieb, engineer of lighting and traffic for the City of Trenton, testified that there was greater need than ever before for developing off-street parking areas in Trenton; that he had recommended the acquisition of the Lenzner property for "permanent parking use"; that he considered this property more suitable for the purpose proposed than other properties on Academy Street and elsewhere; and that he believed the parking facilities on the property could properly be increased by the erection of a ramp garage or otherwise. In the light of the foregoing and the absence of any material contradiction, it seems clear that there was no basis whatever for inferring that the city's determination that it was necessary to acquire the Lenzner property (though other properties were available) was in anywise tainted by fraud or bad faith or constituted an abuse of its broad discretionary powers. See

Burnett v. Abbott, supra; City of Newark v. N. J. Turnpike Authority, supra; Faubel v. Buckeye Pipe Line Co., supra.

The appellants suggest that the city plans to acquire their property and then transfer it to the Parking Authority which will permit its operation by a private party. The ordinance of May 29, 1952 provided that the city shall acquire the property "for the purpose of making the same available to the public for the public parking of vehicles"; it is clear that the acquisition of the property is limited to the stated purpose. See *Hester v. Miller,* 11 *N. J. Super.* 264 (*Law Div.* 1951), appeal dismissed 8 *N. J.* 81 (1951). Mayor Connolly testified that the only decision actually made by the city was to acquire the property in accordance with the ordinance, and that although there had been discussions with respect to the possibility of transferring the property to the Parking Authority, no determination on that issue had ever been made. Mr. Connell likewise testified that the Authority had no assurance that the city would transfer the property to it for operation. He testified further that if the city did transfer the property to the Authority, it would consider the most feasible means of increasing its parking facilities through the erection of a ramp garage and that "if it were more economical for the Parking Authority to deal with private enterprise rather than to finance, construct, operate and maintain itself, there is no question in my mind that the Parking Authority would take that means which was most economical." After the city acquires the property the board of commissioners, in the faithful discharge of its official duties and the proper exercise of its discretion, will be obliged to determine what precise manner of operation will best serve to increase the parking facilities. The city will have several alternatives within the broad statutory powers conferred by the Legislature. See *L.* 1942, *c.* 138, as amended by *L.* 1954, *c.* 205; *L.* 1949, *c.* 261; *L.* 1948, *c.* 198. These alternatives may perhaps result in private construction and operation within, however, the express terms of the pertinent legislative pro-

visions; that fact in nowise impairs the original authority of the city to condemn the property for the purpose of making it available to the public for the public parking of vehicles. The city is at liberty to make the proper determination after it has acquired the property; that it has considered it unwise to attempt to bind a future board of commissioners by making such determination in advance in nowise suggests fraud, bad faith or abuse of its broad discretionary powers. See *Burnett v. Abbott, supra; City of Newark v. N. J. Turnpike Authority, supra; Faubel v. Buckeye Pipe Line Co., supra.* At this stage the city is clearly entitled to the presumption that its ultimate determination will be made in all good faith and will be guided solely by the proper interests of all the citizens of Trenton.

The only remaining contention which warrants discussion is the appellants' point that the city is seeking to acquire their "parking yard business" without making just compensation. The Appellate Division expressed the view that the real concern of the appellants was that the city would take their land without compensating them for the prospective loss of the profits of their business. It declined to pass on any issues relating to the proper *quantum* of the award, holding that they must await the report of the commissioners and any ultimate appeal therefrom under *R. S.* 20:1-16 and *R. R.* 4:92-6. It is at that stage that a jury trial may be demanded. *R. S.* 20:1-20; *R. R.* 4:92-6.

Under the terms of our Constitution and statutes, an owner whose property is being taken for public use must receive just compensation. *Constitution* 1947, *Art.* I, *par.* 20; *R. S.* 20:1-9. See *Valentine v. Lamont, supra; Abbott v. Beth Israel Cemetery Ass'n. of Woodbridge, supra.* The measure of compensation is the fair market value. See *Ringwood Co. v. No. Jersey &c. Comm.*, 105 *N. J. L.* 165, 169 (*E. & A.* 1928); *Jahr, supra,* 92-101. In *Kimball Laundry Co. v. United States,* 338 *U. S.* 1, 5, 69 *S. Ct.* 1434, 93 *L. Ed.* 1765, 1771 (1949), the court pointed out that "value" has many meanings, that oftentimes the value to

the owner differs from the value to the acquirer, but that most things have a general demand which give them a value transferable from one owner to another. Ordinarily this transferable value may be measured by the price which, in all probability, would voluntarily be agreed upon in fair negotiations between an owner willing (but not forced) to sell and a buyer willing (but not forced) to buy; and it is this price which is generally said to determine the fair amount of compensation to be paid to the owner. See *East Ridgelawn Cemetery v. Winne*, 11 *N. J.* 459, 469 (1953); *Jahr, supra*, 100. While it has been pointed out that these concepts are somewhat indefinite, it may well be that their flexibility is the very thing which will best serve to attain the goal in eminent domain proceedings of "justice and indemnity in each particular case." See *Westchester Co. Park Comm. v. United States*, 143 *F.* 2*d* 688, 692 (2*d Cir.* 1944), *certiorari* denied, 323 *U. S.* 726, 68 *S. Ct.* 59, 89 *L. Ed.* 583 (1944).

Where land is being condemned, courts in our State and elsewhere have held that even though the taking of the land actually results in the loss of the owner's business located thereon, he is not entitled to any independent compensation for the value of the business. See *Newark v. Cook*, 99 *N. J. Eq.* 527, 537 (*Ch.* 1926), affirmed 100 *N. J. Eq.* 581 (*E. & A.* 1927); *Mitchell v. United States*, 267 *U. S.* 341, 345, 45 *S. Ct.* 293, 69 *L. Ed.* 644, 648 (1925); *U. S. ex rel. T. V. A. v. Powelson*, 319 *U. S.* 266, 282, 63 *S. Ct.* 1047, 87 *L. Ed.* 1390, 1401 (1943); *Housing Authority of City of Bridgeport v. Lustig*, 139 *Conn.* 73, 90 *A.* 2*d* 169 (*Sup. Ct. Err.* 1952); *Banner Milling Co. v. State of New York*, 240 *N. Y.* 533, 148 *N. E.* 668, 41 *A. L. R.* 1019 (*Ct. App.* 1925); 4 *Nichols, Eminent Domain* (3*d ed.* 1951), 253-259; 1 *Orgel, Valuation Under Eminent Domain* (2*d ed.* 1953), 325. In the *Banner Milling Co.* case, *supra*, the court noted that ordinarily an owner whose land is appropriated may move his business to other premises and it differentiated the specialized situation in which the condemning authority is

authorized by statute to take the entire plant of a public service corporation, such as a water works, with the purpose of continuing its operation as a governmental enterprise; in this situation it is held that the plant is to be valued as a going concern. See *Nichols, supra,* 257. In the oft cited *Mitchell* case, *supra,* the United States Supreme Court upheld the denial of any independent compensation to the owner for the destruction of his business resulting from the taking of his land, even though his business could admittedly not be re-established elsewhere. See *Jahr, supra,* 157; *Orgel, supra,* 324.

Courts have recognized that the foregoing principles may operate harshly in denying to land owners reasonable compensation for their actual loss resulting from the taking of their property; and although varying justifying theories may be found in the judicial opinions, they seem far from compelling. See *Nichols, supra,* 258. More significant is the increasing tendency displayed in recent cases of giving fair and weighty consideration to the consequential loss of business as an element of the compensation rightly due to the owner. See *Kimball Laundry Co. v. United States, supra; Housing Authority of City of Bridgeport v. Lustig, supra;* 18 *U. of Chi. L. Rev.* 349 (1951); 35 *Va. L. Rev.* 1059 (1949). In the *Kimball Laundry Co.* case the United States Supreme Court held that where a laundry plant was temporarily condemned its owner was entitled to compensation for the consequential destruction of its trade routes, though admittedly the government did not directly appropriate or have any use for them. In the *Lustig* case the Supreme Court of Errors of Connecticut dealt with a condemnation report which fixed the value of the owner's poultry market building at $6,500 and then stated that if the owner should be compensated for the building with an established poultry business therein, the fair maket value of the building was $16,500. The court, in sustaining an award of $16,500, held that the owner was entitled to the fair market value of his real property and that in deter-

mining such value it was proper to consider all of the elements which an owner or a prospective purchaser could reasonably urge as affecting its fair price. In the course of his opinion for the entire court, Justice Inglis, after pointing out that the fair market value of real property should be determined in the light of the use to which it is actually being put or the use to which it could most advantageously be put, said:

> "the better reasoned cases hold that, although the value of a business which is being conducted upon the real property condemned may not ordinarily be added to the market value of the realty as damages for the taking, the fact that a given business is in operation on the property should be taken into consideration in determining the market value of the real property if in truth it is a factor in establishing that market value—if, that is, the use of the real property for that purpose enhances the value of it. *Edmands v. City of Boston*, 108 *Mass.* 535, 549; *King v. Minneapolis Union Ry. Co.*, 32 *Minn.* 224, 226, 20 *N. W.* 135; *Pittsburgh, V. & C. Ry. Co. v. Vance*, 115 *Pa.* 325, 334, 8 *A.* 764; *Chairman of Highway Commission v. Parker*, 147 *Va.* 25, 29, 136 *S. E.* 496; *Voigt v. Milwaukee County*, 158 *Wis.* 666, 670, 149 *N. W.* 392. In particular, it is proper to take into consideration the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put. *State ex rel. La Prade v. Carrow*, 57 *Ariz.* 429, 433, 114 *P.* 2*d* 891; *Philbrook v. Berlin-Shelburne Power Co.*, 75 *N. H.* 599, 74 *A.* 873; *Hunter's Administrator v. Chesapeake & O. Ry. Co.*, 107 *Va.* 158, 165, 59 *S. E.* 415, 17 *L. R. A., N. S.*, 124."

See *State Highway Com. v. National Fireproofing Corp.*, 127 *N. J. L.* 346, 348 (*E. & A.* 1941).

In the instant matter the condemnation commissioners will be governed by *R. S.* 20:1-9 which provides that they

shall view and examine the property and "make a just and equitable appraisement of the value of the same." The property being taken under the terms of *R. S.* 40:60-25.1 is land which has been operated profitably by the appellants for many years as a parking lot. Its fair market value, measured by the price which would voluntarily be agreed upon between the hypothetical owner willing to sell and the hypothetical buyer willing to buy, would be fixed after the due weighing of all the facts which customarily enter into their purchase and sale negotiations. A foremost factor in such sale of the parking lot would be its prospective earning power evidenced in considerable part by past earnings. Such sale of the parking lot would actually result in a transfer of the whole commercial enterprise involved—and, as a practical matter, the same result would flow from a forced transfer of the land to the city for public parking purposes. In the light of the foregoing there appears to be nothing in the judicial precedents which would preclude the commissioners from making an award which would truly constitute just and equitable compensation for the taking of the appellants' parking lot. In any event, no award has yet been made and after it is rendered the interested parties will have ample opportunity to have its *quantum* reviewed in accordance with the governing provisions of our statutes and rules.

The judgment of the Appellate Division is:

Affirmed.

CITY OF TRENTON v. LENZNER,

16 N. J. Reports 465 (1954).

MINORITY OPINION

VANDERBILT, C. J. (dissenting). No one can deny the need of Trenton and many other municipalities for off-street parking facilities, and therefore no one can question the grant of the power of condemnation to municipalities for this purpose. Even property presently used by private owners for furnishing parking facilities to the public may be so acquired by the municipality, if by doing so the public will be provided with greater parking facilities than the private owners are supplying and if the condemnation is made in good faith.

The question here is whether there has been compliance with these conditions. In its brief and at the oral argument and again at the reargument the city reiterated that it intended to build a multi-story ramp garage on the premises in question. When this was questioned by the defendants, counsel for the city agreed at the reargument that the city would put its determination with respect thereto in binding legal form, and the decision of the case was delayed pending such action. In due course counsel for the city advised the court by letter that the city was unwilling to commit itself to the position counsel had taken in his brief and at the oral arguments. From this we can only draw one inference, *i. e.*, that the use to which the city would put the property after condemnation would result in no greater parking facilities for the public than it is now obtaining through private ownership. In these circumstances the so-called condemnation would not be a taking of property for a public purpose, which is a fundamental prerequisite of any condemnation, since no public purpose would be served by a taking where no increase in parking facilities would result

therefrom. In these circumstances, without more, the condemnation proceedings would be fatally defective in law. When the facts are examined in the light of the city's new position taken after the reargument, it would seem that the proceedings constitute a misuse of the condemnation statute, for they will not obtain the result intended by the statute; and this makes imperative a plenary inquiry on the question of whether the proceedings are directed to the fulfillment of a public purpose within the powers of eminent domain. The courts have never permitted statutes to be used in such a way as to pervert their true objective by a mere colorable compliance with their requirements.

The Constitution forbids the condemnation of property for private use; and this is ultimately a judicial question after full inquiry. When land is thus taken, ostensibly for a public use, but in reality for a private use, the invasion of the individual's constitutional right of property is remedial by judicial action. An abuse of the statutory discretion and power is as objectionable here as in other fields of governmental action; compare *City of Cincinnati v. Vester,* 281 *U. S.* 439, 50 *S. Ct.* 360, 74 *L. Ed.* 950 (1930). See 65 *A. L. R.* 504.

It is urged by the city that if it does not acquire the defendants' property now, there is always the danger that the owners will sell it for a department store, or other multi-story building, and so decrease the amount of parking facilities available to the public. There is no substance to this argument, for if the property were so sold (and it is interesting to note that no present danger of this eventuality is shown) the city could quickly condemn the property before any new building could be erected.

The individual owners assert that the city is not acting in good faith in condemning their property, and the conduct of the city as outlined herein bears strongly upon that issue. There is, moreover, another factor which deepens the impression that the action of the city in condemning the property is not a *bona fide* exercise of the power.

Directly opposite the parking lot in question is an equally sizable piece of property owned by the city itself. An ancient building known as the Joseph Wood School stands thereon. This building has not been used as a school for 30 years. At the present time only a few rooms are used for the storage of surplus books from the adjoining public library. This piece of property is obviously quite as desirable for parking purposes as the property of the defendants. Is there any reason why the city should not use this practically abandoned property for parking facilities and thus double, without constructing any new buildings, the parking facilities of this part of Trenton? That it has not done so, but has elected to take proceedings that will deprive the defendants of a valuable business without adding to the available parking facilities, constitutes evidence that entitles the defendants to a plenary trial on the issue of the city's good faith, a matter that cannot be disposed of, as was done here, on a motion for summary judgment, *Mayflower Industries v. Thor Corp.*, 15 *N. J. Super.* 139, 155-157 (*Ch. Div.* 1951), affirmed for the reasons expressed therein, 9 *N. J.* 605 (1952).

The necessity of such a trial to protect the defendant property owners is rendered more acute by the fact that under the statutes now on the books the city may without competitive bidding lease the property acquired by condemnation to a private individual or corporation to conduct as a parking lot. Obviously such an individual or private corporation would enter into such an arrangement only with the hope of making a profit out of it. The possible danger to the public welfare and morals inherent in such an arrangement does not need to be diagramed. It is so apparent as to require in the particular circumstances of this case the clearest proof of the good faith of the city before it should be permitted to exercise the power of condemnation. From the standpoint of the individual owners of the parking lot it is as unjust as it is ironic to think that they must submit to having a valuable business taken away

from them in the guise of serving the public interest without there being any increase in the parking facilities in the city, only to find that their business may be turned over by the city to another individual or private corporation to conduct at a profit.

I would reverse the judgment below and direct a plenary trial of the city's right to condemn the property.

Mr. Justice HEHER has authorized me to say that he joins in this opinion.

For affirmance—Justices OLIPHANT, WACHENFELD, BURLING and JACOBS—4.

For reversal—Chief Justice VANDERBILT and Justice HEHER—2.

FILED
MAR 1 3 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954.

No. 606.

ISADORE LENZNER and FREDA LENZNER,
Petitioners,

vs.

CITY OF TRENTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Brief in Opposition to Review by United States Supreme Court on Behalf of Respondent.

LOUIS JOSEPHSON,
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MacCrellish & Quigley Co., Printers, Trenton, New Jersey

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 606.

ISADORE LENZNER AND FREDA LENZNER,
Petitioners,

vs.

CITY OF TRENTON,
Respondent.

STATEMENT OF THE CASE.

The facts, as disclosed and established by the pleadings, records, exhibits and testimony, as set forth in the appendix, filed with the court, briefly stated, are as follows:

The respondent, City of Trenton, a municipal corporation of the State of New Jersey, has decided to acquire, by condemnation, as provided by law, certain lands owned by the defendants, Isadore Lenzner and Freda Lenzner, for the purpose of making the same available to the public for the public parking of motor vehicles by means of the construction and operation of a multiple story parking ramp (Appendix p. 190a, line 30; p. 192a, line 12; p. 212a, line 35; p. 226a, lines 27-33; p. 236, line 29); said lands being more particularly designated and described in the complaint. (Appendix p. 2a.) The remaining defendants named in the

complaint are either the holders of recorded liens on said lands or tenants in possession of a portion thereof.

The legal basis for said action, as set forth in said complaint, is Chapter 138 of the Laws of 1942, as embodied in R. S. 40:60–25.1, which provides that:

> "Public parking lots; acquisition of land. The governing body of any municipality may, by ordinance, provide for the acquisition by gift, devise, purchase or condemnation, of lands therein for the purpose of making the same available to the public for the public parking of vehicles and the cost of the acquisition of any land for such purpose may be raised by general taxation, or by the issuance of bonds of the municipality. Such lands may consist of separate tracts or parcels, contiguous or not contiguous, improved or unimproved, and whether or not abutting upon any State or county road or municipal street. L. 1942, c. 138, p. 427, sec. 1."

As provided by the statute, aforecited, the city on May 29, 1952, duly adopted an ordinance providing for the acquisition of said lands for the purposes aforestated. (Appendix p. 18a.)

After the adoption of said ordinance, providing for the acquisition of said lands above described, as provided by the statute aforementioned, petitioners, Isadore Lenzner and Freda Lenzner, filed suit in the Superior Court, Law Division, against the respondent, City of Trenton, and others, Docket #L-7554-51, by way of complaint in lieu of certiorari, alleging and setting forth 15 reasons why said ordinance, the statute, and the attempt of the respondent, City of Trenton, to acquire said lands and property was illegal, unconstitutional and null and void. (Appendix pp. 47a to 51a.) (Appendix pp. 19a and 20a.) The petitioners further alleging as a basis for their action, that the Board of Commissioners of the City of Trenton had, by ordinance duly adopted on December 16, 1948, created a "Parking Authority of the City of Trenton," as provided by Chapter

198 of the Laws of 1948, R. S. 40:11A–1 et seq. (Appendix p. 48a, line 30); that it duly appointed five persons as Commissioners of said Parking Authority (Appendix p. 49a, line 1); that by reason thereof the Board of Commissioners divested itself of said powers, functions and authority conferred and vested in the Parking Authority aforesaid. Said petitioners demanding judgment that the court so hold and that the same be vacated and set aside. Petitioners further demanding that pending the determination of said action all proceedings, by way of condemnation, seizure or taking of said lands and premises, be stayed.

Upon motion for summary judgment, made by the respondent, City of Trenton, and oral arguments thereon and the filing of a number of briefs, the court, by Honorable Elmer B. Woods, J. S. C., filed his conclusions therein, dated October 8, 1952 (Appendix p. 36a, line 20), and based thereon said Judge Woods made and entered an order for summary judgment on November 6, 1952, dismissing the action of the petitioners, Isadore Lenzner and Freda Lenzner. (Appendix p. 45a.)

The form of the complaint and the procedure followed herein by complaint and order to show cause (Appendix pp. 2a, 4a) being in pursuance to Rule 4:85 (formerly Rule 3:81–C-1, adopted June 25, 1953, effective July 1, 1953) and Rule 4:92 relating to proceedings by way of condemnation. An answer having been duly filed to said complaint by said petitioners (Appendix p. 9a) and to which respondent filed its reply (Appendix p. 32a). The matter came on for hearing upon the pleadings, records, exhibits and testimony as set forth in the Appendix. A motion for summary judgment was made by the respondent (Appendix p. 64a) which motion, after said hearings thereon, was granted by Honorable Ralph Smalley, Judge of the Superior Court on October 30, 1953; said order for summary judgment providing that judgment be and the same hereby is entered in favor of the respondent for the appointment of three commissioners in accordance with the provisions of R. S. 20:1–1 et seq., as amended and supplemented, and the rules of the court made

in pursuance thereto, to fix the compensation to be paid for the taking of the lands, premises, property rights and easements described in the complaint, including the damages, if any, resulting from the taking to any remaining property. (Appendix p. 91a.)

Petitioners appealed from said judgment to the Superior Court, Appellate Division, who affirmed the judgment of the Law Division aforementioned, the reasons for said affirmance being set forth in the opinion of said court (Appendix pp. 316a-321a). The affirmance is set forth in (Appendix p. 322a).

From said judgment of affirmance by the Appellate Division, the petitioners appealed to the Supreme Court of New Jersey, the court of last resort in this State, who affirmed the judgment of said Appellate Court aforementioned. The reasons for said affirmance are set forth in the opinion of the Supreme Court, in the Appendix, page 3, attached to the petition for the writ of certiorari to this court.

REASONS FOR DENYING THE WRIT.

ARGUMENT.

POINT I.

Proposed condemnation is for a public use and purpose. The necessity for such action is legislative and to be determined by the State and its subdivisions to whom such power has been delegated.

In Point I, page 12, of petitioners' petition, it is stated that the proposed taking is not for a public use, but for a private purpose and for the benefit of private individuals. Another reason advanced therein in opposition to the proposed condemnation is that the respondent has other available land for such purposes, while the petitioners have not, and that there is no necessity for such action.

In answer to the aforegoing, respondent submits that the condemnation in question is for a public use; that such use and purpose has been shown, and while the necessity for such action rests with the respondent, it too has been established beyond question. If any further authority is necessary to support such contention it would suffice to add that the Legislature has declared such use to be public in the Act of 1942, involved in these proceedings. Also, that our Supreme Court, in the *DeLorenzo* case, 9 N. J. 379, has judicially determined that: "Maintenance of off-street parking facilities, designed to relieve traffic congestion, constitutes proper public purpose for the accomplishment of which the Legislature may enact appropriate laws."

The power of a municipality to condemn private land for a public use has existed from time immemorial. The right of eminent domain is an inherent attribute of the sovereignty of the State, to take or authorize the taking of any private property within its jurisdiction for public use or to promote the general welfare, without the consent of the

owner, upon payment of a just compensation therefor, according to the method prescribed by law. *State Highway Commission* vs. *City of Elizabeth*, 102 N. J. Eq. 221. *Scudder* vs. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694. *Bergen County Sewer Authority* vs. *Borough of Little Ferry*, 5 N. J. 548.

It is well settled law that the Legislature may, in its wisdom, delegate this power. The Act of March 17, 1891, granted to the municipalities the power to condemn land "for any lawful public use or purpose." This was construed in *Slingerland* vs. *City of Newark*, 54 N. J. L. 62, as applying only to those public uses as the Legislature has expressed its willingness to promote by the power of eminent domain.

In the instant case we have come squarely within those provisions, R. S. 40:60–25.1, supra, specifically delegates to the municipality the power to use the right of eminent domain for the creation of parking facilities. The Act itself describes the acquisition of parking facilities as being in the public interest and for a public purpose—Preamble to 40:60–25.1 *supra*. The ordinance which is the subject of the attack in the instant case declares the public use. (Appendix p. 18a.)

The problem of just exactly what constitutes a public purpose is often a vexing one. However, in this litigation we have a declaration by the Legislature to the effect that the acquisition of parking facilities does fall within the area of "public necessity, public use, or public purpose." While in the ultimate analysis it is a judicial question whether the use is "public" in nature, the "necessity" and "expediency" of the expropriation of private property are purely legislative concerns. If the common weal will be so materially subserved by the project to which the lands are to be devoted as reasonably to deserve the category of a "public" use, it is the exclusive province of the Legislature to determine whether the public interest warrants the exercise of the power of eminent domain for the fruition of the plant. *Coster* vs. *Tidewater Co.*, 18 N. J. Eq. 54; *Olmstead* vs.

Proprietors of Morris Aqueduct, 47 N. J. L. 311; *Sinnickson* vs. *Johnson,* 17 N. J. L. 129; *Ryan* vs. *Housing Authority of Newark,* 125 N. J. L. 336. See *Lenzner* vs. *Trenton,* 16 N. J. 465.

A study of applicable cases reveals that even in 1832 in *Scudder* vs. *Trenton Del. Falls Co.,* 1 N. J. Eq. 694, the Chancellor pointed out that what was to be considered a public use or benefit "may depend upon the situation and the wants of the community for the time being."

In *McSorley* vs. *Fitzgerald,* 359 Pa. 264, 59 A. (2d) 142, the Pennsylvania Supreme Court had little difficulty in accepting the legislative finding that the maintenance of off-street parking facilities, designed to relieve traffic congestion, constitutes a proper public purpose. This case and others of similar view are cited with approval by the Supreme Court of New Jersey in *DeLorenzo* vs. *City of Hackensack,* 9 N. J. 379, *supra.*

Regarding the availability of other lands to the respondent and the inability of the petitioners acquiring other lands, assuming it to be a fact, which has not been supported by the evidence, respondent submits that the municipality has the power and the duty to determine what private property shall be taken for public use. It is a legislative function to determine what particular parcels of land should be used for the public purpose contemplated. *City of Newark* vs. *N. J. Turnpike Authority,* 7 N. J. 377; *Faubel* vs. *Buckeye Pipe Line Co.,* 20 N. J. Super. 116.

The municipality has the duty of determining what land is best suited for the purpose for which it is desired. "The cases and authorities are in agreement that in comdemnation proceedings the quantity of the land to be taken, its location, and the time of taking are within the discretion of the body endowed by the Legislature with the right of eminent domain." *City of Newark* vs. *N. J. Turnpike Authority, supra.* "So long as such a corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, cor-

ruption, manifest oppression, or palpable abuse of discretion." *Faubel* vs. *Buckeye Pipe Line Co., supra.* So long as the land condemned is private property used for a private purpose it is not within the function of the judiciary to determine whether or not the choice was a wise one. All private property is subject to the right of eminent domain. A study of the reported cases does not reveal a single instance of a court denying to the municipality its right of condemnation because the private property was being used for a purpose similar in some respects to the planned public purpose. Rather, we see that there are analogous situations where the right was upheld. Local Housing Authorities were given the power by the Legislature to condemn land for the purpose of public housing. R. S. 55:14A–10, *supra.* The housing authority could condemn private land used for housing for the purpose of creating public housing facilities. This legislation and the subsequent action by the municipality was upheld in *Ryan* vs. *Housing Authority of the City of Newark, supra.*

To hold that private land being used for private purpose could not be condemned merely because of a similarity to the planned public purpose would create great confusion. Query—if a private parking lot is exempt from condemnation for public parking facilities would it not be also exempt from condemnation for any public purpose? Where the Legislature has seen fit to designate certain public uses for which a municipality may exercise the right of eminent domain, and such uses are approved by the courts as being for a public purpose, will the courts then say that certain private property may be condemned for one purpose but not for another? This would scarcely be logical.

The New Jersey Legislature has granted municipalities the right to condemn for public markets. R. S. 40:59–1 et seq. Can it be seriously contended that a grocery store in the area selected for the market would be exempt from condemnation?

Once it is realized that the right of eminent domain is the right to take private property with just compensation, and

when it is realized that the selection of the property is a legislative and not a judicial function, then, it is submitted, the selected private property cannot be exempted from condemnation proceedings because of a mere similarity in use. The question is not so much "what it is being used for now," but rather "what property will best subserve the public interest?"

Based upon the aforegoing, it is submitted that the public use, purpose and necessity is clear and that the action of the respondent is in accordance with law.

POINT II.

Respondent's, City of Trenton's, action in good faith and within the powers granted it by law.

In Point II, page 17, of its petition for the writ of certiorari, petitioners assert that the respondent has not acted in good faith in seeking to condemn its property for the stated use. In support thereof, it is asserted that the City's action in refusing to bind itself to the construction of a ramp garage; its failure to use other lands it owns for such purpose, and its alleged conduct in negotiating for the possible operation of petitioners' property by a private individual or corporation, as a parking lot at a profit, demonstrates its lack of good faith.

In answer to the aforegoing, respondent submits that the same contentions were raised by the petitioners in all of the courts below. The Supreme Court of New Jersey, disposing of the same in its opinion set forth in the Appendix attached to the petition for the writ of certiorari (pages 7a to 10a), declared that the city has acted within the authority and power granted it by the cited statutory provisions and concluded that:

> "The City is at liberty to make the proper determination after it has acquired the property; that it has considered it unwise to attempt to bind a future board of commissioners by making such determination

in advance in nowise suggests fraud, bad faith or abuse of its broad discretionary powers. At this stage the City is clearly entitled to the presumption that its ultimate determination will be made in good faith and will be guided solely by the proper interests of all the citizens of Trenton." (*Burnett* vs. *Abbott*, 14 N. J. 291, *City of Newark* vs. *N. J. Turnpike Authority*, 7 N. J. 377, *Faubel* vs. *Buckeye Pipe Line Co.*, 20 N. J. Super. 116, 120.

POINT III.

Procedure adopted by trial court below and the granting of summary judgment and its affirmance by the Superior and Supreme Courts of New Jersey was in accordance with the law and rules of court.

Petitioners, in Point III, page 18 of their petition, assert that there were palpable issues of fact and law involved; that they were entitled to a trial of the issues of such facts and law, and inferring that some of the facts should have been submitted to a jury; that they were denied such a trial and to which disposition they objected. Petitioners concluding that the granting of the summary judgment and denying a trial was erroneous and constituted a denial of due process in violation of the Fourteenth Amendment. (Petition p. 22.)

Respondent submits that there was a trial of the facts and law in accordance with the statutes of New Jersey and the rules of court applicable thereto, and that the petitioners' assertions and conclusions are based upon a misconception of the law and rules governing the trial of the issues involved in the case at bar, and in support thereof submits the following:

The Legislature of New Jersey, in Chapter 20, Laws of 1953, effective July 1, 1953, by way of amendment of the condemnation act, embodied in R. S. 20:1–2, enacted the following:

"The party exercising the right of taking land or other property by eminent domain shall institute an action in the Superior Court for the appointment of three commissioners to fix the compensation to be paid for the taking of property, including the damage, if any, resulting from such taking, to any remaining property. In any such action, the court shall have, and shall exercise its full jurisdiction, including jurisdiction to determine the right to exercise the power of eminent domain, and the court may proceed in the action in a summary manner or otherwise."

Counsel for petitioners concede the enactment of the statute aforecited and refer to it on pp. 5 and 22 of their petition, excluding therefrom, however, the words "and the court may proceed in the action in a summary manner or otherwise." The aforegoing evidently being the crux of the question on this phase of the case.

The rules governing the procedure to be followed in condemnation proceedings are provided by Rule 4:92–1 et seq., which declares that "An action in condemnation shall be instituted by complaint and order to show cause, pursuant to Rule 4:85," which provides that: "The court shall try the action on the return day, or such short day as it may fix. If no objection is made by any party, or the affidavits show palpably that there is no genuine issue as to any material fact, the court may try the action on the pleadings and affidavits and render final judgment thereon. If any party objects to such a trial and there may be a genuine issue as to a material fact the court shall hear the evidence as to those matters which may be genuinely in issue and render final judgment." The trial that follows in accordance with Rule 4:85–5, as set forth above, must be by the court, who, under the terms and provisions of the statute aforecited is the trier of the facts and the law.

In pursuance to the aforegoing the court set the cause down for trial and hearing on the pleadings and affidavits

which came on before the court on September 15, 1953. (Appendix pp. 107a to 122a.) At the conclusion thereof another date was set for a continued hearing for October 8, 1953, at which time the matter came on before the court. (Appendix pp. 123a to 138a.) After the conclusion of which the hearing thereon was continued to October 23, 1953. At which time the matter again came before the court. (Appendix pp. 139a to 176a.) Depositions having been taken, pursuant to rule by the petitioners and having been previously offered in evidence, together with a number of exhibits and affidavits that had been filed, the court heard the arguments of counsel and granted summary judgment; the court stating that "Which in this instance is practically the same as the trial of the facts, I can't think of anything that would be submitted that has not been submitted. Accordingly, I find that there is no factual dispute of any material fact that could in any way change the issue and the motion for summary judgment in favor of the respondent is granted." (Appendix p. 176a.)

Attention of the court is further called to the mode of trial and procedure in condemnation cases long before the enactment of Chapter 20, Laws of 1953, providing for a trial and hearing in a summary manner, as is demonstrated in the case of *Ryan* vs. *Housing Authority of Newark,* 125 N. J. L. 336, wherein it was held that: "Under our procedural system, the hearing essential to due process in condemnation proceedings may be had by the prerogative writ of certiorari especially provided for by the eminent domain statute." Obviously in such proceedings the court heard and tried questions of fact, even disputed questions of fact, and frequently tried them on affidavits; there being no reported case in which the facts involved in a condemnation case, other than in an appeal from the award of the amount, as determined by the appointed commissioners, that was ever submitted to a jury. Nevertheless, petitioners contend that the summary judgment in the instant case was erroneous. Petition for certiorari p. 22.

Counsel for petitioners, in said petition pp. 19 to 22, enumerates some of the questions and issues of both law and fact involved in the case at bar, cites a number of authorities, and concludes that the court had no authority to try such issues or weigh conflicting evidence, and that doing so deprived them of a trial. All of the authorities cited in support of such contention were regular civil actions at law, instituted by summons, where the right to trial by jury prevailed. Motions were made to strike the answers on the grounds of sham and frivolity. There was a conflict as to the facts. The courts holding in such cases that the facts should be determined by a jury, or to a trial upon the merits. It should be noted in connection with the aforegoing, that not one of the cases cited in the petition deals with actions to be tried by a court in a summary manner or otherwise.

Respondent further submits, in connection with this phase of the case, that although the record discloses, and the court found, that there is not the slightest factual dispute as to any material fact (Appendix p. 175a, line 36), which finding would warrant the court in trying the action on the pleadings and affidavits and render final judgment thereon, the court, nevertheless, heard the evidence as if there were matters which were genuinely in issue and rendered final judgment thereon. (Rule 4:85.)

The aforegoing being conclusively established by the record, as set forth in the Appendix consisting of 315 pages, made up of affidavits, even an affidavit in support of answer and brief (Appendix pp. 25a to 31a) which is unheard of in law; 105 pages of depositions taken by the appellants (Appendix pp. 177a to 282a), numerous exhibits consisting of newspaper clippings, even dealing with matters having no relation to the issue in the cause. While most of the aforegoing testimony, evidence and exhibits were repetitious, immaterial, irrelevant and for other reasons objectionable, no objections were interposed in order that petitioners would not have any basis for contending that they were

prevented from presenting their case. In addition to all of the aforegoing, four hearings were held by the court, as shown by the transcripts consisting of 83 pages (Appendix pp. 93a to 176a). Nevertheless, petitioners contend that they were denied a trial.

The question then arises—Was all of the foregoing a trial and hearing in a summary manner or such other manner as the court may determine? Did not the court hear the evidence as to those matters which may be genuinely in issue, assuming there were such issues, and render final judgment? An additional question that arises is what other evidence, and in what other manner would or could it be presented? And it also may be submitted—how can it be logically or lawfully contended that summary proceedings cannot be determined and disposed of in a summary manner?

The Supreme Court of New Jersey in concluding its opinion on this phase of the case, p. 7a of the Appendix attached to the petition for the writ declares that:

> "The finding by the trial judge that the record before him disclosed that there was no genuine issue as to any material fact was unanimously concurred in by the Appellate Division; independent examination of the record has led us to the same conclusion. Under these circumstances there can be no doubt as to the adequacy of the trial court's power to deal with and finally dispose of the matter on the application for summary judgment. See *City of Newark* vs. *N. J. Turnpike Authority*, 7 N. J. 377, 381 (1951)."

In view of all of the aforegoing it is submitted that the procedure adopted by the trial court and the judgment made and entered therein was in accordance with the statutes and the rules of court of the State of New Jersey.

That being established, it is submitted that this court cannot go into the propriety or validity of such procedure,

and in support thereof submits the case of *United States* vs. *Pink,* 315 U. S. 203, wherein it was held that: "Where the New York Court of Appeals affirmed the judgment dismissing a complaint by the United States against the Superintendent of Insurance of the State of New York, to recover assets of the New York Branch of a Russian insurance company on the ground that a prior case decided by the New York Court of Appeals involving the same questions left open no question which has been argued upon this appeal, the United States Supreme Court could not inquire into the propriety under the New York practice of grounding the motion for summary judgment on the record in such prior case, since that was a question of State law."

Concerning the question of the right to a trial by jury, respondent submits the case of *Southern R. R. Co.* vs. *Durham,* 266 U. S. 178, wherein it was held that: The right of a jury trial in a State court is determined by local law, concerning which this court accepts the decision of the highest State court.

POINT IV.

No legal or factual basis established by the record justifying review of judgment of the Supreme Court of New Jesrey.

Petitioners, under the heading of "Jurisdiction" on page 2 of its petition, declare that: "Jurisdiction to review this case upon writ of certiorari is conferred upon this court by 28 United States Code, sec. 1257 (3)." Said section provides that:

> c. By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

Nowhere in the petition is the validity of the State statute drawn into question on the ground of its being repugnant to the Constitution or laws of the United States. Respondent submitting that the other matters contained in said statutory enactment as a basis for review are not supported by the facts, and have not been deemed legally sufficient to justify review by this court, and in support thereof respondent submits the following authorities.

In the case of *Oklahoma Tax Commission* vs. *Texas Co.*, 336 U. S. 342, it was held that:

> "Ordinarily construction given to State statute by the State's highest court capable of deciding the question is binding on Supreme Court."

In the case of *Williams* vs. *Kaiser*, 323 U. S. 471, it was held that:

> "A decision of the State Supreme Court is binding on United States Supreme Court insofar as State law is concerned."

The case of *Madden* vs. *Commonwealth of Kentucky*, 309 U. S. 83, held that:

> "The United States Supreme Court accepts interpretation of State laws by State appellate court."

This court in the case of *Aero Mayflower Transit Co.* vs. *Board of R. R. Com'rs. of State of Montana*, 332 U. S. 495, held that:

> "The United States Supreme Court is bound by the construction given to State statutes by State courts."

To a similar effect is the case of *Musser* vs. *State of Utah*, 333 U. S. 95.

Another important legal rule of construction adopted by this court in the case of *Central Vermont R. Co.* vs. *White*, 238 U. S. 507, is that:

> "Matters affecting the remedy are governed by the law of the forum, and a decision of a State court on a matter of State pleading or practice is therefore not reviewable by the United States Supreme Court."

And in the case of *Daniel* vs. *Family Sec. Life Insurance Co.*, 336 U. S. 220, it was held that:

> "Supreme Court may not decide desirability of legislation in determining its constitutionality; the forum for correction of ill considered legislation being a responsive legislature."

CONCLUSION.

Numerous questions and contentions have been injected in the petition for the writ by counsel for the petitioners, such as whether the condemnation of the lands would provide greater parking facilities for the public than at present; was a ramp to be constructed and, if so, when; who would operate it, and what would be the measure of damages for the taking, when the condemnation takes place. Also injected therein is whether the City owns other lands that it could use for such purposes, and in connection therewith an exhibit is attached to the petition termed "Plat of Site," Appendix to petition p. 2a, which was not introduced in evidence in the proceedings below and which is not part of the record filed with the court below.

Respondent submits that all of the aforementioned matters and questions, and others too numerous to mention, were not in issue in the court below, and are not in issue before this court, and have no place or bearing relating to the jurisdictional question involved in these proceedings.

Respondent further submits that the case at bar involves a simple question of statutory law and procedure of the State of New Jersey, the validity of which has been construed and upheld by its court of last resort. It does not involve a federal question of substance not theretofore determined by this court, nor in a way probably not in accord with the applicable decisions of this court.

Respondent therefore submits that no legal basis exists for the review of the decision of the Supreme Court of New Jersey, by way of a writ of certiorari issuing out of this court, which in the final analysis is not a matter of right, but of sound judicial discretion. Petitioners having litigated this cause through four separate courts over a period of three years, there would seem to be no special and important reasons therefor.

For the above stated reasons it is submitted that this Honorable Court should not entertain the jurisdiction of said cause and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Louis Josephson,
Attorney for Respondent.